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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-121

BERNARD MURPHY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DANIEL E. ISLES, ESQ.
501 Central Avenue
Orange, New Jersey 07050

LEGAL MIMEOGRAPH

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Bernard Murphy, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported. It is reprinted in Appendix A of William A. Sternkopf, Jr.'s (a co-defendant below) Petition for Writ of Certiorari, upon which Appendix Petitioner, Bernard Murphy relies.

Jurisdiction

The judgment of the United States Court of Appeals affirming the judgment of conviction of Petitioner was entered on May 22, 1972. A timely application for an extension of time in which to file this petition was granted by Mr. Justice Brennan on June 5, 1972. The time to file was extended to and including July 21, 1972.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Statutes and Constitutional Provisions Involved

The statutes involved are Title 18 U.S.C., Sections 371, 1951 and 1952. The constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States. They are printed in Appendix B of William A. Sternkopf, Jr.'s Petition for Writ of Certiorari upon which Appendix Petitioner Bernard Murphy relies.

Questions Presented

1. Whether Bernard Murphy was deprived of his fundamental right to a fair trial by the fact that the Government proved multiple and unrelated conspiracies not involving him.

2. Whether Bernard Murphy was deprived of his constitutional right to an adequate defense by the admission into evidence of monies intended to be used for the preparation of his defense.

STATEMENT OF THE CASE

A. Proceedings Below

On November 16, 1970, the Federal Grand Jury for the District of New Jersey returned a thirty-four count indictment naming Petitioner Murphy and eleven co-defendants in every count.

Count I charged that defendants and other co-conspirators, from at least as early as November 1, 1963, and continuing to the date of the indictment, conspired in violation of the Hobbs Act (18 USC §1951):

> "to delay, to obstruct, to impede and to thwart *construction* undertaken on behalf of *the City of Jersey City and the County of Hudson*, the contractors and the engineers performing such work, and the timely and usual movement of supplies and materials needed to complete such projects, in order to obtain the property of contractors, engineers and others working for and on said *public construction projects* pursuant to said contracts, . . . having been induced both by the wrongful use of fear and under color of official right . . ." (Appendix C of William A. Sternkopf, Jr.'s Petition for Writ of Certiorari) (Emphasis supplied)

Count II charged that, during the period from November 1, 1963, to the date of the indictment, the original defendants and other co-conspirators, in violation of 18 USC §371, the general conspiracy statute, conspired with each other:

> "1. . . . to commit certain offenses against the United States in violation of . . . Section 1952 of Title 18, United States Code [The Travel Act] in that the defendants and said co-conspirators would travel . . . in interstate commerce . . . and . . . use . . . the facilities of interstate commerce . . . with the intent to promote . . . unlawful activity, said unlawful activity being the crimes of bribery and extortion in violation of the laws of the State of New Jersey, [and]
>
> "2. . . . [to] perform other acts for the purpose of hiding and concealing and causing to be hidden and concealed the purposes of, and acts in furtherance

of the conspiracy. . . ." (Appendix C of William A. Sternkopf, Jr.'s Petition for Writ of Certiorari upon which Appendix Petitioner, Bernard Murphy relies.)

Count II also alleged five overt acts in furtherance of "the conspiracy."

Counts III through XXXIV alleged specific substantive offenses in violation of the Hobbs Act and in furtherance of the conspiracy charged in Count I.

Prior to trial, defendants John J. Kenny (hereinafter J. J. Kenny) and Frank G. Manning, respectively, were severed on motion of the United States Attorney because they were to be immunized witnesses for the government. Following the government's opening statement, defendant Corrado was also severed and pleaded guilty to Count II. The trial of the nine remaining defendants continued until June 10, 1971, when defendant John V. Kenny (hereinafter J. V. Kenny—no relation to J. J. Kenny) was severed for reasons of health.

At the close of the government's case, five of the substantive counts were dismissed. Transcript below, hereafter referred to by page reference above. (4781-86) After a seven-week trial, the jury found seven of the remaining defendants, including Bernard Murphy, guilty of all 29 remaining counts, and found defendant Kunz guilty on 17 of those counts.

After sentences were imposed (Petitioner Bernard Murphy receiving a 15 year sentence) all the defendants except one appealed. Thereafter, two of the appellants withdrew their appeals. On May 22, 1972, the Court of Appeals for the Third Circuit rendered a judgment affirming the convictions of the five remaining appellants.

B. The Facts

The government basically contended that contractors doing business with Jersey City and Hudson County were forced to make payoffs to the Democratic administration of J.V. Kenny in order to do business with the City and County (6638).

The government produced as witnesses several contractors who allegedly made payoffs. The prosecution sought to corroborate the testimony of the contractors by the testimony of two former defendants who testified as to receiving bribes and

extortionate payments. The government proved that the payoffs were intended for those other than the direct recipients (461, 669, 559, 864, 876, 880, 882), and that it was the overall Democratic organization of J.V. Kenny, which ultimately received the monies (6636).

The government also showed that J.J. Kenny, (a former defendant who testified under a grant of immunity) had an arrangement by which he helped operate a numbers racket with a notorious underworld figure, Lefty Marchito. In doing so, the government showed that Kenny earned in the neighborhood of $200,000.00 (1209). Kenny emphasized that the conspiracy with Marchito went no further than the two of them. Kenny also testified that he conspired with defendant, Thomas Whelan, and Lefty Marchito concerning a proposed payoff to Whelan of $250,000.00 (1015). There was no proof that this conspiracy in any way related to any of the other defendants nor to the purposes of either of the conspiracies charged in the indictment.

The government further elicited testimony from one Sam DiFeo to the effect that he had provided free automobiles to Helen Kropke, wife of the defendant, Fred Kropke, and to Captain Robbins, a police officer subordinate to Kropke (2284, 2292). Neither Helen Kropke or Captain Robbins were named as co-conspirators in the case. There is no allegation that the incidents involving the two automobiles related to any of the other defendants nor to the objectives or purposes of the conspiracies charged in the indictment.

The government also elicited testimony from J.J. Kenny to the effect that he had communicated with his co-defendant. J.V. Kenny upon his indictment, and that J.V. Kenny had given him the sum of $50,000.00 to "investigate and hire accountants for the credibility of Frank Manning and anyone else." (1091) There is no testimony to indicate that the $50,000.00 was to be used for any untoward purpose. Rather, the record shows that it was to be used solely for the purpose of defending the case below.

Reasons for Granting Writ

1. Since none of the above conspiracies involved more than two of the twelve original defendants, and since none of them were connected to the basic theory of the government's case, the petitioner Bernard Murphy was seriously prejudiced by the proofs involving them.

It would be impossible for the jurors to distinguish the extraneous conspiracies outlined above from the general conspiracies charged in the indictment. The evidence involving those conspiracies spilled over onto noninvolved defendants. This transference of guilt was especially prejudicial since the two conspiracies involving defendants, Whelan & J.J. Kenny involved very substantial monies and a notorious racketeer. The Court did not even instruct the jury as to the possibility of finding separate conspiracies.

It is well established that the possibility of prejudice is inherent in proving multiple conspiracies, each involving some but not all of the defendants in a multi-defendant case. See *Kotteakos* v. *United States* 328 U.S. 750, 755, 90 L. Ed. 1557 (1946). The test for determining whether defendants were unduly prejudiced was well stated in *United States* v. *Varelli* 407 F 2d, 735, 747 (7th Cir. 1969). The Court held that the propriety of joining separate conspiracies for trial depends upon:

> " 'The number of possible conspiracies and conspirators . . .' The identity of the parties to the transaction, the *modus operandi*, the area of operation, the lapse of time, etc."

See also *MacElroy* v. *United States*, 164, U.S. 76 (1896); *Ward* v. *United States*, 289 F 2d, 877 (4th Cir. 1959); *Chubet* v. *United States*, 414 F 2d, 1018 (8th Cir. 1969); *United States* v. *Barnard*, 342 F 2d, 209 (9th Cir. 1965), Cert. den. 382 U.S. 984 (1965), Reh. den. 382 U.S. 1002 (1966); *Ingram* v. *United States*, 272 F 2d, 567 (4th Cir. 1959); *United States* v. *Goss*, 329 F 2d, 545 (9th Cir. 1961) Cert. den. 366 U.S. 948 (1961).

The above cited cases involved situations analagous to those at bar. In the present case, as in those cited, there are multiple defendants and multiple conspiracies. Also, as in the cases cited, the miltiple conspiracies involved a fairly small percentage of the number of defendants.

In examining the proofs in the present case in light of *Varelli, supra,* it is readily apparent that at least two of the guide lines set forth in *Varelli* were ignored by the Trial Court. As to the "identity of the parties," two of the twelve original defendants were involved in the conspiracies described herein: the conspiracy involving the operation of a numbers racket involved only one of the twelve defendants, John J. Kenny, who has been severed from the trial; the conspiracy involving an attempt to obtain a $250,000.00 bribe from a gambling figure involved only two of the 12 sefendants, John J. Kenny and Thomas Whelan; and the conspiracy involving the automobiles consisted of one of the twelve defendants, Fred Kropke.

It is also apparent that the *"modus operandi"* test referred to in *Varelli supra* was not followed. The government went to great pains to establish that bribery and extortion payments were a way of life in Hudson County and a condition precedent to doing business there. Therefore, the *"modus operandi"* proven pursuant to the general conspiracies involved certain of the defendants acting as collectors of extortive monies from contractors who were making the payments in order to obtain contracts or obtain payment. Accordingly, the government showed that contractors were approached prior to submitting bids and prior to their receiving payments on contractual work performed. The payments were allegedly destined for the higher echelon of the Democratic party machine in Hudson County. Obviously, that *"modus operandi"* was in no way applicable to the extraneous conspiracies described herein. The first two conspiracies involving Lefty Marchito involved either bribes or extortive payments made to cover up criminal activities. The conspiracy involving Kropke's automobiles showed, if anything, an act of personal greed by one of the defendants having nothing to do with and in no way benefiting any of the other defendants. Nevertheless, it is beyond question the jury considered the evidence of the extraneous conspiracies against all of the defendants.

2. **The admission of the fifty thousand dollars into evidence infringed upon the Petitioner's constitutional right to counsel.**

The *United States Constitution, Sixth Amendment,* provides that an accused has a right "to have Assistance of Counsel for his defense". It is axiomatic that the right to assistance of counsel includes the right to have effective assistance of counsel. Effective right to counsel necessitates that counsel be given the time and means to adequately investigate and prepare a defense. See *Krull* v. *United States,* 240 F 2d, 112 (5th Cir. 1957). Cert. den. 353 U.S. 914 (1957). In preparing a defense in a complex case such as the one at bar, the use of investigators and accountants is imperative and their work product is a judicially protected right. *United States* v. *Jackson,* 322 F 2d, 460-462 (9th Cir. 1963).

However, if as in the present case, the employment of investigators and accountants can be considered independently evidenciary of a crime, the accused is circumscribed in the preparation of his defense. The hiring of investigators and accountants is no less a constitutional right of the defense than is the retention of counsel. To make evidence of the retention of help in preparation of the defense indicative of a consciousness of guilt is to deny that right entirely. An accused would face the following paradox: Although his defense would necessarily entail the employment of professional help to which he has a constitutional right, the employment of such help would, in and of itself, be used to aid in his conviction. The prospect of a defendant's preparation for trial becoming evidence against him would indeed have a chilling effect on such preparation. Therefore, the admission into evidence of money to be used for the preparation of a defense effectively chilled the defendants right to effective representation of counsel under the Sixth Amendment.

Conclusion

For the foregoing reasons, this petition for a Writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. BAIME
Counsel for Petitioner
1136 Clinton Avenue
Irvington, New Jersey